

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF COMMUNITY HEALTH,
BUREAU OF HEALTH PROFESSIONS,

UNPUBLISHED
March 11, 2008

Petitioner-Appellee,

v

STEVEN JAMES VANDERMAY, L.L.P.,

Respondent-Appellant.

No. 275617
Board of Psychology
Disciplinary Subcommittee
LC No. 2003-000777;
2004-003805

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right the final order of the disciplinary subcommittee of the Department of Community Health Board of Psychology (disciplinary subcommittee), suspending his license to practice as a limited license psychologist (LLP) for two years for violations of article 15 of the Public Health Code, MCL 333.16101 *et seq.* We affirm.

Respondent first argues that the disciplinary subcommittee's decision to suspend his license for violations of MCL 333.16221 was not supported by competent, material and substantial evidence. We disagree.

This Court reviews challenges to factual basis for the disciplinary subcommittee's final order to determine whether the final order is "supported by competent, material and substantial evidence on the whole record." *Dep't of Community Health v Risch*, 274 Mich App 365, 371-372; 733 NW2d 403 (2007), quoting Const 1963, art 6, § 28. "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Id.*, quoting *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). If the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence. *Id.* Also, a reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result. *Id.*, citing *Black v Dep't of Social Services*, 212 Mich App 203, 206; 537 NW2d 456 (1995).

MCL 333.16221 provides, in relevant part:

The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:

(a) A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully practice the health profession.

(b) Personal disqualifications, consisting of 1 or more of the following:

(vi) Lack of good moral character.

The disciplinary subcommittee concluded that respondent was negligent and lacked good moral character, in violation of MCL 333.16221(a) and (b)(vi), when he: “a) took Brian Walton home with him and allowed him to spend the night in Respondent’s apartment; b) failed to prevent Brian Walton from having access to pornographic material in his apartment; c) failed to accurately and completely document the frequency and nature of numerous contacts with the client; and d) interfered with the client’s therapeutic relationship with his primary therapists.”

In challenging the evidence supporting the disciplinary subcommittee’s finding that his actions constituted negligence, respondent first argues the evidence does not support the disciplinary subcommittee’s conclusion that he violated the standard of care by taking Walton to his home. In fact, the disciplinary subcommittee’s conclusion that respondent taking Walton to his home for an overnight visit constituted negligence is supported by expert testimony from Dr. Clark who, when asked whether respondent’s conduct was an error in judgment or a violation of the standard of care, stated:

This was a decision on his part, apparently a concerted—a deliberate decision, to take this boy home and have him spend the night with him. It wasn’t something that he rethought after he had put the boy in his car or however he transported him there. And the boy actually stayed the entire night. It’s hard to see this as a simple lapse of judgment.

If it is, this is a lapse of judgment by someone who has no capacity for good judgment, because it’s a major breach [of the standard of care].

Respondent argues that the disciplinary subcommittee erred by relying on Dr. Clark’s testimony, and should have relied on testimony from his expert, Dr. Abramsky, who testified that respondent’s actions constituted an error in judgment. However, the disciplinary subcommittee deemed Dr. Clark’s testimony credible and gave it great weight. If the administrative findings of fact and conclusions of law are based primarily on a credibility determination, this Court

generally will not disturb such findings on appeal because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence. *Risch, supra* at 371-372. Because there is credible evidence in the record to support the disciplinary subcommittee's decision that respondent's actions violated the standard of care, we will not disturb the disciplinary subcommittee's findings.

Respondent next argues that the evidence does not support the disciplinary subcommittee's finding that his conduct interfered with the client's therapeutic relationship with his primary therapists. Walton had two primary therapists, Donna Seely and Maria Tendero. Seely, Walton's primary therapist from July 1997 to March 1998, testified that respondent indulged the client's immediate needs, which was detrimental to the therapeutic relationship she had with her client. Tendero, Walton's primary therapist from March 1998 to October 1999, testified that respondent's failure to document client contacts undermined her clinical relationship with her client because she sometimes would not know what was going on in the case. Tendero also testified that respondent would undermine her by remedying Walton and his family's problems with "quick fixes," rather than helping them to learn to handle crises on their own. Respondent acknowledges Seely's and Tendero's testimony, but argues that their testimony merely illustrates their conflicting views on how best to serve the clients. Although one could interpret their testimony as showcasing conflicting styles, the disciplinary subcommittee took the testimony at face value. Seely and Tendero stated that respondent undermined and interfered in the therapeutic relationships they had with their clients in general, and Walton specifically. As a direct consequence of this evidence, the disciplinary subcommittee concluded that respondent interfered with Walton's therapeutic relationship with his primary therapists. Substantial evidence in the record supports the disciplinary subcommittee's conclusion; therefore, this Court will not set it aside.

Respondent also challenges the evidence supporting the disciplinary subcommittee's conclusion that he was negligent when he failed to prevent Walton from accessing pornographic material in his apartment. Respondent claims that the disciplinary subcommittee found him negligent because he exposed Walton to gay pornography, and would not have punished him so harshly if he had exposed Walton to heterosexual pornography. Although the disciplinary subcommittee quoted Dr. Clark's testimony regarding the damaging effect of gay pornography on Walton in its findings of fact, it is not apparent, nor it is logical to infer, that the disciplinary subcommittee's decision was motivated by anti-homosexual sentiment. Rather, it is firmly grounded in evidence on the record. Respondent admitted that he had pornography at house the night Walton slept over. Dr. Clark testified that exposing a child to pornography generally, and gay pornography in this particular circumstance, jeopardizes the therapist/client relationship by injecting sexuality into what should be a safe, platonic relationship. These facts are substantial evidence that support the disciplinary subcommittee's conclusion that respondent was negligent for failing to prevent Walton from accessing pornography.

Respondent also challenges the factual support for the disciplinary subcommittee's conclusion that his conduct constituted a lack of good moral character. Good moral character, when used as a requirement for an occupational or professional license, means: "the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner." MCL 338.41(1). Respondent claims that his failure to document client contacts did not evidence a lack of fair, honest and open dealings with the public; rather, it showed that he

was not open and honest with his co-workers. However, the definition requires the licensed person to *serve* the public in a fair, honest and open manner. Therefore, his service, i.e., his client contacts, had to be out in the open. By failing to disclose his contacts with Walton, respondent was not serving the public in a fair, honest and open manner. He was serving the public in a secret, dishonest manner that undermined the therapists' clinical relationships with Walton and his family. Whether this was by design or due to respondent's poor documentation skills is irrelevant. Respondent had a duty to serve Walton in a fair, honest and open manner. The facts in the record support the disciplinary subcommittee's conclusion that respondent did not do so, and, therefore, lacked good moral character.

Respondent's next argument is that the phrase "lack of good moral character" is unconstitutionally vague because it does not provide fair notice of the conduct prohibited. This Court reviews the constitutionality of a statute *de novo*. *Dep't of State Compliance & Rules Division v Michigan Education Association-NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002).

All statutes are presumed to be constitutional and are construed as such unless their unconstitutionality is clearly apparent. *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 341-342; 675 NW2d 271 (2003). The party challenging the statute has the burden of rebutting the presumption. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003). "The 'void for vagueness' doctrine is derived from the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001). A statute may be challenged for vagueness on three grounds: 1) it is overbroad and impinges on First Amendment freedoms; 2) it does not provide fair notice of the conduct proscribed; or 3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the statute or ordinance has been violated. In evaluating a statute challenged as unconstitutionally vague, the entire text of the statute should be examined and the words of the statute should be given their ordinary meanings. *Dep't of State Compliance & Rules*, *supra* at 116.

Here, respondent argues that the phrase "lack of good moral character" does not give fair notice of the conduct proscribed. To give fair notice, a statute must give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469; 688 NW2d 523 (2004). Good moral character is defined in the statute as "the propensity on the part of the person to serve the public in the licensed area in a fair, honest and open manner." MCL 338.41(1). Giving the words of the statute their ordinary meanings, a person of ordinary intelligence would conclude that the statute prohibits furtive contacts with the public and requires a degree of transparency and accountability. Moreover, the statute does not inadvertently proscribe a wide range of conduct. Indeed, the statutory language is reasonably precise in prohibiting unfair, dishonest and secretive behavior. Accordingly, the statute is not void for vagueness.

Respondent also claims that the complaint against him should have been dismissed because the disciplinary proceedings did not conclude within one year, as required by MCL 333.16237(5), and because the disciplinary subcommittee did not meet and impose a penalty within 60 days of receiving the hearing referee's proposal for decision, as required by MCL 333.16232(3). MCL 333.16237(5) provides:

The compliance conference, the hearing before the hearings examiner, and final disciplinary subcommittee action shall be completed within 1 year after the department initiates an investigation under section 16231(2) or (3). The department shall note in its annual report any exceptions to the 1-year requirement.

MCL 333.232(3) provides:

A disciplinary subcommittee shall meet within 60 days after receipt of the recommended findings of fact and conclusions of law from a hearings examiner to impose a penalty.

In *Dep't of Consumer & Industry Services v Greenberg*, 231 Mich App 466, 468; 586 NW2d 560 (1998), this Court held that a disciplinary subcommittee's failure to meet and impose a penalty on the respondent within sixty days after receiving the hearing referee's proposal for decision, as required by MCL 333.16232(3), did not mandate dismissal of the administrative complaint. This Court noted that the statute does not provide for a sanction when a disciplinary subcommittee fails to comply with the time requirement. *Id.* This Court opined, "[t]he lack of sanction leads us to believe that the time frames set out and relied on by appellant are primarily guidelines for the disciplinary system at issue here." *Id.* Consequently, the *Greenberg* panel concluded that, "the passage of more than sixty days, especially in the complete absence of any specific allegations of prejudice suffered by appellant, did not require dismissal of the complaint." *Id.* at 469.

Respondent urges this Court to overturn *Greenberg*, *supra* at 466, arguing that the time limits are meaningless if they are not enforced by the imposition of sanctions for failing to comply with the statutory time limits. Respondent further argues that dismissal is the only appropriate remedy. We decline respondent's invitation to reexamine and overturn *Greenberg*. As noted by the *Greenberg* Court, the statute does not provide for dismissal based on a violation of the deadlines, and this Court should not read such a sanction into the statute. See, e.g., *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself). From the statutory text, it is clear that reporting delays in the department's annual report is only consequence the Legislature intended for deadline violations. See MCL 333.16237(5); MCL 333.16241(8)(e).

Moreover, when, as is the case here, respondent is partially responsible for any delay, it is not appropriate to grant respondent relief for an issue partly of his own making. See, generally, *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (a party cannot take a position before the trial court, request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error). Respondent requested, and was granted, three adjournments during the disciplinary proceedings. Also, respondent's hearing was postponed at least twice due to on going settlement negotiations. In addition, the resolution of the disciplinary proceedings was inhibited by the parties' agreement to take expert testimony at depositions and file the depositions and closing arguments with the hearing referee within 90 days after the last day of the hearing. At no point did respondent attempt to expedite the resolution of the case, nor did he ever complain about the delay. See, e.g., *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 361; 564 NW2d 519 (1997)

(holding that the administrative proceedings were not fundamentally unfair due to delay when the petitioner was partially responsible for the delay and did not complain about the delay). Indeed, his actions stalled the administrative tribunal's efforts to resolve this matter.

Respondent further claims he was prejudiced by the delays because he forced to take an administrative position that does not involve patient care during the pendency of this action. We note that respondent secured employment in his field for the duration of the disciplinary proceedings. Additionally, respondent's position at Southwest Counseling and Development was largely administrative; he supervised the therapists and had a small caseload of clients. Therefore, it is not apparent how, or to what degree, respondent was actually prejudiced. Also, respondent could have acted to speed up the process, rather than seeking numerous continuances, if returning to direct patient care was his pressing desire. Similarly, respondent could have taken steps to alleviate the stress he claims to have endured.

Respondent also makes a broad claim that the three-year gap between the issuance of the administrative complaint and the issuance of the disciplinary subcommittee's decision denied him due process of law. Respondent did not cite any legal authority to support his assertion that the three years it took to resolve this matter was a due process violation. The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *In re Application of Ind Mich Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Accordingly, we deem respondent's due process claim abandoned. We note, however, that respondent was responsible for many of the delays incurred in these proceedings. It cannot be said, then, that the state denied respondent due process.

Respondent also contends that he was denied the opportunity to be heard at a meaningful time or in a meaningful manner by the disciplinary subcommittee. Again, respondent only makes a general statement that he is entitled to the opportunity to be heard at a meaningful time and in a meaningful manner without explaining why his administrative hearing did not satisfy the due process requirements. The disciplinary subcommittee reviewed the entire administrative record, which included lengthy testimony from respondent and his expert witness. Furthermore, respondent did not show that he was actually denied the opportunity to be heard by the disciplinary subcommittee. There is no evidence that respondent requested an audience with the disciplinary subcommittee, or that the disciplinary subcommittee somehow thwarted his efforts to be heard. Pursuant to MCL 333.16138(2), all licensing board meetings, including disciplinary subcommittee meetings, must be open to the public in accordance with the Open Meeting Act, MCL 15.261 *et seq.* Therefore, respondent could have attended the disciplinary subcommittee meeting, and exercised his right to address the subcommittee pursuant to MCL 15.263(5), which permits a person to address a public body at a meeting. Accordingly, respondent did not show that he was denied due process.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder